UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SNYDER GARLAND, JR., Appellant, v. DEPARTMENT OF THE AIR FORCE, Agency.	DOCKET NUMBER CH07528910489 DATE: APR 05 1990

Archibald W. McMillan, Esquire, Dayton, Ohio, for the appellant.

Charles A. Buenning, Jr., Esquire, Wright-Patterson AFB, Ohio, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

After full consideration, the Board DENIES the appellant's petition for review of the initial decision issued September 22, 1989, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order with respect to the timeliness of the appeal. The appeal is DISMISSED for lack of jurisdiction.

BACKGROUND

By notice dated April 9, 1985, the agency proposed the appellant's removal from his position of Computer Assistant, GS-9, for an unauthorized attempt to divert approximately $559.00 from the Principal Combined Fund Organization (United Way of the Dayton Area) to the Greene County NAACP (National Association for the Advancement of Colored People) by falsifying fourteen 1984 Combined Federal Campaign Pledge Cards. *See* Agency File, Tab 4d, Attachment A16. After considering the appellant's replies, the agency issued a decision on May 23, 1985, finding that the evidence warranted the appellant's removal effective May 29, 1985. *Id.* at Attachment A17. The appellant, however, elected to retire on May 28, 1985, but claimed that it was under duress. *Id.* at Attachment A19.

The appellant subsequently filed two equal employment opportunity (EEO) complaints within the agency, alleging discrimination on the bases of race/color (Black), age (55) and reprisal for EEO activities with regard to the removal action, the alleged forced retirement after receipt of the removal decision, and the alleged improper processing of an informal EEO complaint. *Id.* at Attachments B1 and B2. On May 9, 1989, the agency issued its decision, finding that the appellant was not discriminated against in the matters raised in his complaints. The decision also informed the appellant of his grievance rights and his right to appeal to the Board no

later than 20 calendar days after "the effective date of [his] removal." *See* Agency File, Tab 4a.

On May 23, 1989, the appellant filed an appeal with the Board's Chicago Regional Office. *See* Appeal File, Tab 1. Since the appeal appeared to be untimely, the appellant was afforded an opportunity to show good cause of his late filing, *see id.* at Tab 7, and the appellant filed a Motion For Waiver based on receipt of the agency's EEO decision of May 9, 1989. *Id.* at Tabs 10 and 12.

In her initial decision, the administrative judge dismissed the appellant's appeal for lack of jurisdiction and untimely filing. The administrative judge found that, although the appellant claimed that he was "forced to retire," he did not allege that the agency sought his retirement or exercised pressure on him to retire, that the circumstances permitted no alternative, and that he involuntary accepted the terms of the agency. Further, the administrative judge found that the appellant failed to make a nonfrivolous allegation that the threatened removal was purely coercive or that the agency misinformed him or deceived him into retiring. The administrative judge, therefore, concluded that the appellant retired to avoid a removal for cause; that his retirement was voluntary; and that his appeal was not within the Board's appellate jurisdiction. She further found that absent an otherwise appealable matter, the Board lacked jurisdiction to entertain the appellant's discrimination and retaliation claims.

With regard to the timeliness issue, the administrative judge found that the appellant did not file a timely formal EEO complaint of discrimination with the agency within twenty-days of the alleged constructive removal[1] under 5 C.F.R. § 1201.154 nor establish good cause for the untimely filing of the appeal with the Board under 5 C.F.R. § 1201.22(b).[2]

In his petition for review of the initial decision, the appellant reasserts his contention that he would not have retired but for the coercion of the proposed removal. Specifically, he contends that the agency had no reasonable basis for taking a removal action since his error regarding United Fund Campaign solicitations resulted from good faith intentions and misunderstanding applicable regulations. The appellant further challenges the administrative judge's finding that his appeal was untimely.

ANALYSIS

The appellant's appeal was timely filed.

As noted above, the administrative judge found that the appellant's appeal was untimely because he did not file a timely formal complaint of discrimination with the agency within twenty days after the effective date of the action

[1] The appellant filed his formal EEO complaints of discrimination on August 9, 1986, more than fifteen months after the alleged constructive removal. *See* Agency File, Tabs B1 and B2.

[2] A petition for appeal must be filed no later than twenty days after the effective date of the action being appealed. 5 C.F.R. § 1201.22(b).

appealed, nor show good cause for waiver of the twenty-day time limit for filing an appeal with the Board pursuant to 5 C.F.R. § 1201.22(b). The Board, however, has recently held in *Cohen v. Department of the Army*, MSPB Docket No. DA07528910098 (October 31, 1989), that 5 C.F.R. § 1201.154(a) contains no explicit requirement that an employee file a complaint of discrimination within twenty days of the action at issue. Rather, it only requires that a timely complaint be filed. *Cohen*, slip op. at 3. The timeliness of discrimination complaints is governed by EEOC's regulations at 29 C.F.R. § 1613.214(a)(1), which sets no limit on the amount of time that may pass between the alleged statutory violation and the filing of a formal complaint, as long as its other time limits are met. *Id.* Nothing in the record here indicates that the appellant's formal complaints were not timely filed.[3] Since the appellant's appeal to the Board was filed within twenty days of his receipt of the agency's final EEO decision, we find that the instant appeal was timely filed under 5 C.F.R. § 1201.154(a)(1).

The appellant failed to establish the jurisdiction of the Board by preponderant evidence.

The record does not support the appellant's argument that his retirement was involuntary. As correctly noted by the

[3] The agency accepted the two formal complaints, a hearing was held before an EEOC administrative judge who issued a recommended decision, and the agency issued its final decision on the complaints on May 9, 1989.

administrative judge, the fact that the appellant was faced with unpleasant choices, i.e., to face the removal action or retire, does not affect the voluntariness of the appellant's ultimate choice to retire. *See Schultz v. Department of the Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987); *Christie v. United States*, 518 F.2d 584, 587-88 (Ct.Cl. 1975). Absent a showing that the agency knew or believed that the termination could not be substantiated, or that an arguable basis for discharge did not exist, the fact that the appellant's removal was proposed did not render the appellant's subsequent retirement involuntary. *See Harvey v. Veterans Administration*, 2 M.S.P.R. 517, 519 n.1 (1980), citing *Leone v. United States*, 204 Ct.Cl. 334, 340 (1974), and *Christie*, 518 F.2d at 588. Here, as detailed in the initial decision, the record demonstrates that the agency had reasonable grounds for proposing an adverse action. *See* Agency File, Tabs 4c and 4d. *See also Schultz*, 810 F.2d at 1136.

Moreover, the record reflects that the appellant was free to choose his course of action, understood the options, and had ample time to make a reasoned and informed decision to retire. *See Covington v. Department of Health and Human Services*, 750 F.2d 937, 941-42 (Fed. Cir. 1984); *Wells v. Department of the Navy*, 3 M.S.P.R. 293, 294 (1980). The administrative judge correctly found the appellant's allegations, even if proven, to be insufficient to establish a prima facie case of coercion, duress, deception, or misinformation. *See Dumas v. Merit Systems Protection Board*,

739 F.2d 892, 894 (Fed. Cir. 1986); *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983). The appellant must do more than merely rebut the agency's reasons for the removal action to show coercion. *See Schultz*, 810 F.2d at 1136. Thus, in the absence of a nonfrivolous allegation that the agency sought his retirement, exerted pressure on him to retire or misinformed or deceived him, there is no basis for a jurisdictional hearing. *See Fletcher v. U.S. Postal Service*, 39 M.S.P.R. 380, 385 (1989).

Accordingly, the initial decision is affirmed with respect to its findings of fact and ultimate conclusion of law on the jurisdictional issue, and modified with respect to its finding regarding timeliness.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.